Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

GREG RUTHERFORD, Butte County Sheriff's Deputy, MICK GREY, Butte County Sheriff, and COUNTY OF BUTTE,
Petitioners,

vs.

RICHARD LEO DEORLE
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether, in an alleged use of excessive force case, a peace officer who fires a beanbag round, in accordance with his training and accepted police standards, at an intoxicated out of control suspect who was known to have threatened to kill officers while in possession of a board with nails, roofing hatchets and a crossbow pistol and who suddenly advances toward the officer threatening to physically assault him while holding a container of lighter of fluid is acting objectively reasonable under the Fourth Amendment.

2) Whether, in an alleged use of excessive force case, a peace officer is entitled to qualified immunity when the undisputed facts show the officer's conduct did not violate a constitutional right.

3) Whether, in an alleged use of excessive force case involving non-deadly force, a peace officer should be required to provide a warning, if feasible, to the suspect.

4) Whether, in the application of qualified immunity to an alleged use of excessive force case, the standard for what constitutes clearly established law requires that there be factually analogous case law consistent with the opinion of this Court in Saucier v. Katz, 533 U.S. 194 (2001) and other Circuit Courts of Appeal or that no prior case prohibiting the use of force under these circumstances is required as determined by the Ninth Circuit in this case.

5) Whether, a peace officer involved in an alleged use of excessive force is entitled to qualified immunity when a reasonable officer could not have known he may be violating the law due to an unsettled legal standard and

where there is no case law precedent defining application of the legal standard.

List of Parties

All of the parties to this proceeding are listed in the caption.

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Opinions Below

The Second Amended Opinion of the Court of Appeals for the Ninth Circuit is reported at 272 F.3d 1272, and is reprinted in the Appendix hereto, pp. 1-24. Also reprinted in the Appendix is the First Amended Opinion at pp. 25-46, and the Original Opinion at pp. 47-65.

The memorandum order of the United States District Court for the Eastern District of California granting summary judgment in this case has not been reported. It is reprinted in the Appendix hereto, pp. 68-75 and the Order denying Plaintiff's Motion for Reconsideration is reprinted in the Appendix hereto, pp. 66-67.

Jurisdiction

On November 19, 2001, the Ninth Circuit Court of Appeals filed its Second Amended Opinion and an order denying Petitioner's Amended Petition for Rehearing and Suggestion for Rehearing En Banc.

The Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

Fourth Amendment To The United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

On September 9, 1996, Richard Deorle was intoxicated, agitated and acting out of control while at his home in Butte County, California. E.R. 107-108. Both Deorle and his wife characterize Deorle as having lost control of himself. Supp. E.R. 312-313; Supp. E.R. 137. Deorle's wife, Ronda, called 911 at approximately 4:00 p.m. E.R. 107. In response, Deorle told her that the police would have to come and kill him. Supp. E.R. 122. Butte County Deputy Sheriff George Mahon, responded to the scene, heard screaming from inside the residence and found the situation to be sufficiently volatile that he immediately placed a call for Code 3 (urgent) backup. Supp. E.R. 380.

Deputy Mahon was able to remove Mrs. Deorle and the children to his patrol unit located in the driveway of the residence. Supp. E.R. 380. As he began speaking with Mrs. Deorle, Deputy Mahon was confronted by Deorle who was holding a large two by six inch board with nails protruding from the end of it. Id. Deputy Mahon drew his gun and ordered Deorle to put the board down, which Deorle eventually did. Id. As Deputy Mahon continued speaking with Mrs. Deorle, however, Deorle then picked up two roofing hatchets, one in each hand. Id.

Mrs. Deorle advised Deputy Mahon that Deorle was upset at previously being diagnosed with Hepatitis C and had started drinking alcohol earlier that day. E.R. 180; Supp. E.R. 380. She believed and informed Deputy Mahon that the alcohol mixed with his medication for Hepatitis C was causing the rage he was exhibiting.[1] Id. Deputy Mahon was also informed that Deorle had been previously arrested for assaulting his wife and had been on probation. Id.

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[1] The blood alcohol test later performed on Deorle revealed that he had a .177 percent blood alcohol level. E.R. 196.

A number of deputies and officers from both the Butte County Sheriff's Department and the Paradise Police Department subsequently arrived at the scene. See Supp. E.R. 60-61. The deputies set up roadblocks in this residential area at the nearby intersections of Creston and Skyway and Creston and Sherwood Roads. Supp. E.R. 34; Supp. E.R. 174-76 (diagram of scene). Deputies observed Deorle wander around his property, including being up on the roof of his residence. Deorle approached several deputies at the roadblock at Sherwood and Creston Roads three or four times, yelling at them and threatening them while holding a hatchet in one hand and a metal crossbow pistol in the other hand. Supp. E.R. 52-53; Supp. E.R. 156-61. Deorle challenged to take on all of the deputies one at one time and for them to kill him. Supp. E.R. 52-53; Supp. E.R. 156-61; Supp. E.R. 385. Deorle approached another deputy, who had positioned himself on Creston Road across from Deorle's residence, and pointed the loaded crossbow at him. Supp. E.R. 158; Supp. E.R. 385. Deorle also threatened that he would kill anyone who came on his property. Supp. E.R. 34. Throughout these events, deputies instructed Deorle to drop his weapons and surrender, but Deorle resisted all of the attempts to detain him peacefully. Supp. E.R. 158; Supp. E.R. 385.

Deputy Greg Rutherford was specifically called to the scene because he was trained in the use of the non-lethal beanbag round and was the leader of the Special Incident Response Team ("SIRT"). Deposition of Deputy Rutherford at p. 29; Supp. E.R. 320-21. Deputy Rutherford had been trained in the use of non-lethal weapons and that the appropriate and intended use of the beanbag rounds included confrontations with suicidal persons or persons that are violent or hostile and threatening injury or death to themselves, officers or others. Supp. E.R. 320; Depo. of Rutherford at p. 53. Rutherford also knew from his training that the device was intended to enable the application of force with less potential for causing death or serious physical injury than conventional police tactics. Supp. E.R. 320, 322. The beanbag round is designed to knock down a person in order to protect the

safety of the officers or civilians. Id.; Depo. of Rutherford at p. 53. The training included instruction that the appropriate distance for the use of the device was between twenty to forty feet, directed at the center mass of the target. Supp. E.R. 320, 322.

While en route to the scene, Rutherford was monitoring radio traffic and heard yelling, screaming, that Deorle was out of control, and was brandishing hatchets and a crossbow. E.R. 109; Supp. E.R. 321; Supp. E.R. 62. Upon arriving at the scene, Rutherford was told that Deorle had been involved in a violent domestic situation, had threatened officers with a board with nails sticking out of it, had threatened officers with roofing hammers or hatchets, and threatened officers with a crossbow. Supp. E.R. 321; Supp. E.R. 62-63; Depo. of Rutherford at pp. 30-31. Rutherford was also told that Deorle was under the influence of alcohol and possibly had controlled substances and medication in his system, and Deorle had recently been informed he had some type of possibly lethal disease. Id. Deputy Rutherford was further advised that a neighbor was still at home and the perimeter was not secure, as virtually no one was behind Deorle's home. Supp. E.R. 63; Depo of Rutherford at p. 36. Deputy Rutherford then observed Deorle walking around the neighborhood yelling and screaming. Supp. E.R. 63; E.R. 142.

Deorle returned to the area near the road block at Creston and Sherwood Roads now armed with the crossbow and a container of charcoal lighter fluid. Supp. E.R. 321; Supp. E.R. 63. At that point Deputy Rutherford and Lieutenant Nichols of the Paradise Police Department went to survey the area around Deorle's residence in order to brief the rest of the SIRT team and prepare a diagram of the area. Supp. E.R. 321; Supp. E.R. 63; Depo. of Rutherford at pp. 35-36. Deputy Rutherford did not go onto Deorle's property with the intent of deploying the beanbag round. Depo of Rutherford at pp. 49-51.

Deorle apparently spotted them and returned to the area around his driveway, still in possession of the crossbow and the can of lighter fluid. Supp. E.R. 321-22; Supp. E.R. 63-64. Deputy

Rutherford took cover behind a tree in the front yard of the residence directly next door to the Deorle residence, approximately forty feet away from Deorle, and Lieutenant Nichols took position of cover a few feet behind Rutherford. Supp. E.R. 63, 174-76. Deputy Rutherford could not see whether the crossbow was loaded with an arrow but assumed that it was. Supp. E.R. 63; Depo. of Rutherford at pp. 60-61.[2]

Several minutes passed as Deorle stood approximately forty feet away threatening Rutherford with physical harm and generally taunting Rutherford to shoot him. E.R. 109; Supp. E.R. 63-64; Depo. of Rutherford at pp. 44-45. Deputy Rutherford ordered Deorle to put down his weapons. Supp. E.R. 322; Supp. E.R. 390; Supp. E.R. 35. Deputy Rutherford aimed his shotgun loaded with the beanbag round at Deorle and Deorle saw the gun pointed at him. Supp. E.R. 322; Depo of Rutherford at pp. 96-97; Depo. of Richard Deorle at p. 86. Deputy Rutherford felt that if Deorle reached a point of about thirty feet from him, he and others in the area would be put in jeopardy and therefore he would fire the beanbag round in order to knock Deorle down and arrest him. Supp. E.R. 322; Depo. of Rutherford at pp. 43, 49-51, 107; Supp. E.R. 64.

Deorle threw down the crossbow and suddenly advanced toward Deputy Rutherford with a can of lighter fluid in his hand threatening the deputy that he was going to kick his ass. E.R. 110; Supp. E.R. 322; Supp. E.R. 390. Deputy Rutherford considered the can of lighter fluid to be a threat to him, as Deorle could have sprayed lighter fluid in the deputy's eyes and taken his weapon or Deorle could have sprayed him with fluid and lite him on fire. E.R. 151; Supp. E.R. 64; Supp. E.R. 322; Depo. of Rutherford at pp.

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[2] Deorle stated, in a taped interview taken two days after the incident, that the crossbow was loaded. Supp. E.R. 310. Deorle's wife stated in her interview just after the incident, that the crossbow "does look serious." Supp. E.R. 132 (Judge Silverman), Dissenting) App. p. 21, n.1.

106-07. Deputy Rutherford was also concerned about the safety of neighbors at home nearby and bystanders who had gathered in this residential area who could be harmed if Deorle were to get by him. E.R. 146; Supp. E.R. 64; Supp. E.R. 322; Depo. of Rutherford at pp. 49-51, 107. Lieutenant Nichols also believed that Deorle was going to assault Deputy Rutherford. Supp. E.R. 390.

When Deorle reached approximately thirty feet from him, Deputy Rutherford shot the beanbag round intending to strike Deorle in the lower right torso. Supp. E.R. 322; Supp. E.R. 64; Depo. of Rutherford at pp. 66, 94. The beanbag round malfunctioned, flew up and to the right, unexpectedly striking Deorle in his left eye and causing injury. E.R. 67; Supp. E.R. 322; Supp. E.R. 64.

Deputy Rutherford estimated that he was on the scene for approximately thirty to forty minutes before deploying the beanbag round. E.R. 37. The Paradise Police Department dispatch log indicates that one hour and twenty-eight minutes passed from the time they received the call for backup to the deployment of the non-lethal force. Supp. E.R. 70.

B. The District Court Proceedings

On March 20, 1997, Deorle brought suit in the United States District Court for the Eastern District of California. He asserted claims against Deputy Rutherford, Butte County Sheriff Mick Grey and The County of Butte ("County Defendants") pursuant to 42 U.S.C. § 1983 alleging that his rights under the Fourth and Fourteenth Amendments had been violated. The jurisdiction of the District Court was founded upon 28 U.S.C. § 1343(a)(3). He also brought suit against Defense Technologies, Inc, the manufacturer of the beanbag round, on theories of negligence and products liability. Both the County Defendants and Defense Technologies filed motions for summary judgment.

On April 13, 1999, the District Court granted the County Defendants/Petitioners' Motion for Summary Judgment on the

grounds that Deputy Rutherford was entitled to qualified immunity in that a reasonable jury could not find that no reasonable officer would have made the same decision under the circumstances. The Court found that Deputy Rutherford did not violate Deorle's right to be free from excessive force as a matter of law. The District Court reasoned that a deranged and threatening Deorle advanced on Deputy Rutherford and put him on the defensive, forcing him to make a split-second decision to protect himself. Furthermore, the Court reasoned that the surrounding officers could not have prevented Deorle's attempted attack without deploying less-lethal or lethal force themselves, and Deputy Rutherford's only alternative was to engage in hand to hand combat, a choice the law does not compel. App. pp. 73-74. Because the District Court found that Deputy Rutherford did not violate Deorle's right to be free from excessive force, it dismissed, without deciding, Deorle's remaining claims against the Sheriff and the County of Butte.

Plaintiff filed a Motion for Reconsideration with the District Court, which was denied on May 3, 1999. After the District Court also granted Defense Technologies' Motion for Summary Judgment, final judgment was entered as to all issues on June 14, 1999.

C. The Court Of Appeals Proceedings

On July 9, 1999, Deorle filed an Amended Notice of Appeal from the District Court's Order granting County Defendants/Petitioners' Motion for Summary Judgment.

On March 16, 2001, the Court of Appeals rendered a split decision. The majority opinion authored by Judge Reinhardt in favor of Deorle, reversed the District Court's entry of summary judgment. App. p.47. A strong dissent was authored by Judge Silverman.

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Court of Appeals denied the Petition for

Rehearing and Suggestion for Rehearing En Banc, but issued an amended opinion on August 31, 2001. App. p.25

Petitioners filed an Amended Petition For Rehearing and Suggestion for Rehearing En Banc based upon this Court's Opinion in Saucier v. Katz. An active judge requested a vote on whether to rehear the matter en banc, but the matter failed to receive a majority of the votes from the active judges in favor of en banc consideration, and the Petition for Rehearing En Banc was therefore denied. However, the Court of Appeals issued a second amended opinion in an attempt to bring its opinion into compliance with this Court's recent opinion in Saucier v. Katz. App. p.1. The majority opinion again denied qualified immunity to Deputy Rutherford, without citing to any factual analogous case law, with a dissenting opinion by Judge Silverman.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review Is Warranted Because Of The National Importance In Determining Whether The Use Of Non-Deadly Force Through The Deployment Of The "Beanbag" Round Is A Reasonable Use Of Force Against An Advancing Threatening And Dangerous Individual And The Analysis By The Majority Panel Of The Ninth Circuit Significantly Departs From The Decisions Of This Court.

On November 19, 2001, in a 2-1 split decision, the Ninth Circuit issued an opinion which found the shooting of the beanbag round at Deorle violated Deorle's right to be free from an unreasonable seizure. App. p. 18. In reaching its decision, the majority opinion disregarded the guidance of this Court in Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989). Specifically, the majority opinion relied upon an hindsight analysis, increased the burden of a peace officer in establishing a governmental interest and has created a new legal standards by requiring a warning, when feasible, in situations involving less than lethal force, and requiring officers to differentiate between a mentally unstable person and other criminal suspects in dangerous situations.

Review of that opinion is therefore necessary and appropriate since the majority opinion conflicts with the decisions of this Court and other Circuit Courts and to provide for a rule of national application and uniformity to be relied upon by peace officers when using non-deadly force in the form of shooting a beanbag round.

In Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001), this Court clarified the appropriate analysis for determining whether a peace officer is entitled to qualified immunity in cases involving the alleged use of excessive force. This Court instructed that lower courts need to concentrate on the definition of the constitutional right and determine whether a constitutional violation could be found on the facts in that case. Id. at 285. If no constitutional right could have been violated under those facts, then it is not necessary for any further inquiry regarding qualified immunity. Id. Although the facts must be taken in the light most favorable to the party asserting the claim, a peace officer's conduct is reviewed based upon the facts and circumstances known to the peace officer, including reasonably trustworthy information provided to them. Id. at 285 citing Hunter v. Bryant, 503 U.S. 224, 228, 112 S. Ct. 534 (1991) quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223 (1964). "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." Id. at 285. Moreover, in those circumstances, "officers can have reasonable, but mistaken beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations, courts will not hold that they have violated the constitution." Id. at 284.

The totality of the undisputed facts and circumstances in this case compel the conclusion that Deputy Rutherford's conduct was objectively reasonable within the meaning of Graham. Deorle was intoxicated, out of control and on a rampage. He had threatened officers with a board with protruding nails, hatchets and a crossbow and had threatened to kill any officer who came on

his property. He also threatened that it would be necessary for the officers to shoot him. The crime of threatening officers with weapons that would cause them great bodily injury or death was not only serious, but there were potentially grave consequences to both the officers present, to whom Deorle posed a serious threat of harm, and to Deorle himself who taunted the officers to kill him. Deorle was ultimately charged with four felony counts of violation of California Penal Code section 69 which prohibits the use of threat or violence to prevent an officer from performing his duties.

The undisputed facts also establish that Deorle posed an immediate threat to the safety of Deputy Rutherford. Deorle was advancing toward Deputy Rutherford armed with a quart container of lighter fluid and threatening words to the effect that he was going to kick his ass. The lighter fluid could obviously be sprayed at Deputy Rutherford's eyes from a distance to attempt to incapacitate him or could be used to light him on fire and therefore must be considered as a weapon. Once Deorle reached a point within twenty feet or less of Deputy Rutherford, the beanbag round could not be used. The alternative of hand to hand combat or the use of other impact weapons could likewise result in serious injury to either the officers or Deorle. Deputy Rutherford was also concerned about the safety of neighbors and bystanders. Here, the very essence of the Graham factors came into play. Deputy Rutherford was attempting to access the Deorle property to better familiarize himself and the SIRT team with the scene. When Deorle returned to his property and discovered Deputy Rutherford, Deorle was holding the crossbow and the lighter fluid, their exchange of words was tense and given the facts known to Deputy Rutherford about Deorle's intoxicated and threatening conduct there was no telling what Deorle may do. From the perspective of a reasonable officer on the scene in the position of Deputy Rutherford, Deorle suddenly made a decision to advance at him which required Deputy Rutherford to make a split-second decision to use the beanbag round to temporarily incapacitate Deorle. It is undisputed that through his threats and actions, Deorle was

advancing toward Deputy Rutherford intending to cause him serious harm. Petitioners respectfully submit that based on the circumstances confronting Deputy Rutherford, his conduct was objectively reasonable under the Fourth Amendment.

The majority panel of the Ninth Circuit erred in analyzing whether the force used was objectively reasonable in this case by adopting new or different legal standards inconsistent with this Court's analysis in Graham. Initially, the Court of Appeals found the use of beanbag rounds to constitute non-deadly force.[3] The Court of Appeals then analyzed the nature and quality of the intrusion on Deorle's Fourth Amendment interests in the context of the type and amount of force used. App. p. 9. The Court of Appeals classified the use of the beanbag as force capable of causing serious injury. App. p. 11. In so doing, the court found this type of force could be lethal under some limited circumstances. App. pp.10-11. However, the majority panel disregarded the evidence as to the nature and purpose of the beanbag round. First, the beanbag round is designed to knock a person down and temporarily incapacitate them. Second, when fired at a distance between twenty and forty feet, the beanbag round is not reasonably calculated to cause serious injury. Rather, the beanbag round is meant to prevent serious injury. Moreover, Deputy Rutherford was trained in the proper use of the beanbag round and that its appropriate use would involve confrontations with suicidal persons and those threatening injury or death to themselves, officers or others. When that evidence is viewed in the context of this case, the type of force in the form of shooting a beanbag round is appropriate and reasonable.

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[3] The issue of whether the use of a beanbag round constituted deadly or non-deadly force had not previously been decided by any reported decision. See Omdahl v. Lindholm, 170 F.3d 730 (7th Cir. 1999)(remanded case to district court for determination of whether beanbag rounds constitute deadly or non-deadly force).

In assessing the amount of the force used, the majority panel relied upon on the nature of the injury sustained by Mr. Deorle. This type of "after the fact analysis violates the fundamental precept of Graham" by relying upon hindsight in terms of what injury was ultimately sustained by the suspect. See Forrester v. City of San Diego, 25 F.3d 804, 808 n.4 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (rejecting reliance on the serious nature of the injuries suffered by plaintiff to negate the reasonableness of the force). In actuality, the amount of the force used must be analyzed in relation to the officer on the scene. In this case, the shooting of the beanbag round was meant to knock down and temporarily incapacitate Deorle. Thus, the nature and quality of the intrusion upon Deorle's personal security in relation to the amount of force used was intended to be minimal.

In reaching its decision, the majority panel also created new legal standards for analyzing whether use of non-lethal force is objectively reasonable under the Fourth Amendment. Determining that the shooting of the beanbag round violated Deorle's right to be free from unreasonable seizures, the majority opinion determined that "less than deadly force that may lead to serious injury may be used only when a strong governmental interest warrants its use, . . ." App. p. 18. In so doing, the Ninth Circuit has now increased the burden on government officials in cases involving the use of force when the particular force may lead to serious injury. Broadly construed, the Ninth Circuit could now characterize almost any type of force under the right circumstances as leading to serious injury. See Vera Cruz v. City of Escondido, 139 F.3d 659, 661-63 (9th Cir. 1997), *cert. denied*, 525 U.S. 869 (1998)(use of dogs are non-lethal force although the use of almost any type of force can be potentially lethal). This heightened standard of a strong governmental interest has not previously been imposed in any cases involving the use of non-lethal force and is contrary to the standard set forth in Graham. In Graham, this court made it clear that the test for determining whether the force used is reasonable under the Fourth Amendment necessitates a

balancing of the individual's interests against the governmental interest at stake. Graham v. Connor, supra, at 1871 citing Tennessee v. Garner, 471 U.S. 1, 8, 105 S. Ct. 1694 (1985). At no time has this Court imposed a heavier burden on the officer in the form of a "strong" governmental interest.

In addition, the majority panel of the Ninth Circuit has now established that in cases involving the use of force which may result in serious injury, warnings should be given, when feasible. App. pp. 16-18. Once again, there is no case law which supports the proposition that a peace officer is either required to or should issue a warning, if feasible, in connection with the use of non-deadly force. Thus far, the only cases which require or suggest that a warning be given to the suspect are those involving the use of deadly force. Nevertheless, the majority panel found that "the desirability and feasibility of a warning are obvious." App. p. 17. On that basis, the majority panel concluded that the failure to give a warning is a factor to be considered in a case involving the use of non-lethal force that is being analyzed under the Graham test. To now impose that factor in this case is clearly the type of hindsight analysis prohibited by this Court in Graham. Therefore, Petitioner respectfully submits that the majority panel of the Ninth Circuit erred in imposing a warning factor in analyzing the use of non-lethal force in this case.

In what also appears to be a novel finding, the majority panel concluded that the governmental interest in using force is diminished by the fact that the officers are confronted with a mentally ill individual. App. p. 15. Similar to requiring a strong or substantial governmental interest and a warning, the Ninth Circuit now seeks to impose a requirement that officers in the field make a determination whether a suspect is mentally ill and, if so, they must limit their use of force under the circumstances. Without any factual or statistical foundation, the majority also concluded problems and tactics employed against an unarmed emotionally distraught individual who is creating a disturbance or resisting arrest is different from those involving an officer's use of

force to subdue an armed or dangerous criminal. App. p. 15. To the contrary, a disturbed individual who is threatening peace officers, whether armed or not, can pose a serious threat of injury or death to a peace officer. Petitioners respectfully submit that it is not necessarily appropriate for an officer to distinguish between an individual who is mentally ill and a criminal. Rather, the important consideration is the individual's conduct and whether he poses a threat of injury or death to the officer, themselves or others.

In this case, although Deorle may have been emotionally distraught, he was also intoxicated and threatening to kill officers while holding various lethal devices. If allowed to stand, it is this type of approach suggested by the Ninth Circuit which may lull an officer into bringing his guard down and which could result in a greater likelihood of injury or death to an officer. For those reasons, Petitioners respectfully submit that such a factor should not be recognized and considered within the Graham framework, and in particular should not have been considered within the context of this case.

In weighing the conflicting interests, the majority panel also emphasizes that Deputy Rutherford had alternatives available to him other than firing the beanbag round. App. pp. 13-14, 16. Specifically, the majority panel suggests that Deputy Rutherford should have retreated and escaped from his position to the roadblock or some buffer zone behind him. Alternatively, Rutherford could have merely awaited the arrival of skilled negotiators. Traditionally, however, officers have not been required to use the less intrusive degree of force possible. See Forrester v. City of San Diego, 25 F.3d 804, 807 (9th Cir. 1994). Nor have they been required to assess whether they can retreat or run backwards. See, *e.g.*, Plakas v. Drinski, 19 F.3d 1143, 1149-50 (7th Cir. 1994). In this case, Deputy Rutherford was in the process of surveying the area in and around Deorle's residence in order to familiarize himself and other officers regarding the property. It was Deorle who confronted Deputy Rutherford and it was Deorle

who suddenly advanced toward Deputy Rutherford threatening to do him physical harm. Thus, the undisputed facts do not present the type of situation where there is no immediate threat to the safety of the officer which may allow for reflection and consideration of alternative methods of taking Deorle into custody. Rather, Deputy Rutherford attempted to speak to Deorle, felt he should maintain the position where he felt secure and it was only after Deorle began advancing toward him holding the container of lighter fluid and threatening to kick his ass that the deputy fired the beanbag round in accordance with his training at a distance of approximately thirty feet. Therefore, Petitioners respectfully submit that the majority panel of the Ninth Circuit erred in relying upon any potential alternative methods for the use of force in weighing the conflicting interests in this case.

The opinion of the Ninth Circuit also conflicts with other Courts of Appeal who have found analogous uses of non-deadly force reasonable. In Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992), the Court of Appeals for the Sixth Circuit granted qualified immunity to an officer who used a taser or stun gun weapon to incapacitate a mentally disturbed and suicidal individual who was refusing to return to a mental institution. The taser shoots a dart that sends a high voltage electric current through an attached wire and is designed to incapacitate a person. Id. at 1040, n.1. In Russo, the police were confronted with a suicidal and mentally unstable Thomas Bubenhofer, who was threatening the officers and appeared in a doorway a few feet from the officers holding a knife in each hand. Id. Upon seeing this, an officer shot a taser dart at Bubenhofer. However, Bubenhofer momentarily shook off the effects of the taser and began to rush at the officers. The officers then fired their revolvers at him, striking him and causing him to fall down six or seven stairs. However, Bubenhofer would not drop the knife and the officer shot two more taser darts at Bubenhofer, one striking him in the face. Although the tasers momentarily slowed him, Bubenhofer again lunged at the officers while holding the knife and the officers fired

their revolvers at him, killing him. The Sixth Circuit determined that the officer's initial and second uses of the taser to subdue the deranged, threatening and armed individual did not constitute excessive force and thus granted qualified immunity to the officer who fired the taser. Id. at 1044-45. The court noted that, although in hindsight the use of the taser proved tragic, the officer fired the taser in an effort to obviate the need for lethal force. Id.; see also Hinton v. City of Elwood, 997 F.2d 774 (10th Cir. 1993)(finding officer's use of stun gun against resisting suspect to be objectively reasonable).

Moreover, other Circuit Courts of Appeals have ruled that the use of deadly force was reasonable in circumstances which were similar to those of this case. In Plakas, *supra*, 9 F.3d 1143, a deputy's shooting of an intoxicated and deranged man who charged him with a fireplace poker was held to be reasonable by the Seventh Circuit Court of Appeals. The Court of Appeals stated:

> [Deputy] Drinski was faced with a man who had, minutes before, attacked a police officer with a dangerous weapon, had refused several entreaties to disarm, had told the officer that one of the two would die that night, and then had moved toward the officer while raising [a fireplace poker] to strike. Shooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an act of self defense even if, as Plakas's expert maintains, the man is attempting "suicide by police."

Id. at 1146; see also Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691 (1st Cir. 1994)(holding that officers' shooting intoxicated man who made kicking-lunging motion toward them with two small knives was reasonable). If the use of deadly force in these cases were deemed reasonable, the use of non-deadly force by the

beanbag round in this case should also be considered reasonable. Similarly to what occurred in Plakas, a deranged Deorle advanced on Deputy Rutherford while holding a container of lighter fluid and threatening the Deputy. Also as in Plakas, Deorle had repeatedly threatened to take his own life and to kill or assault any officer who got in his way. The only difference between the cases is that, in this case, Deputy Rutherford used non-deadly, rather than deadly force.

Law enforcement confrontations with out of control and enraged individuals often necessarily involve the use of deadly force with unsettling results. Recently, law enforcement agencies have begun to seek alternatives to the use of deadly force in certain situations where it can be avoided. One such way law enforcement has attempted to avoid the use of deadly force has been to develop devices that deploy non-lethal or less than lethal force. See Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability For The Use Of Excessive Force*, 28 CREIGHTON L. REV. 733, 735 (1995). Non-lethal or less than lethal force, such as the beanbag round used in this case, are so termed because they are much less likely to result in death or serious injury when used properly. Id. In addition to the beanbag rounds used in this case, some examples of these alternatives to deadly force are tasers or stun guns, rubber bullets, pain compliance techniques and pepper spray. See id. at n.4; Plakas v. Drinski, 19 F.3d 1143, 1150, n.6 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994). However, there is always some likelihood that death or serious injury will result whenever any force is used, even if it comes in the form of an alternative to deadly force. See Miller, 28 CREIGHTON L. REV. at 735-36, n.2 (citing Joseph Berger, Westchester Man Sprayed by Police Dies, N.Y. Times, Oct. 15, 1993, at B1, Pepper Spray Comes Under Scrutiny After N.C. Man Dies in Police Custody, 27 Crime Control Digest 3, Aug. 2, 1993). The majority opinion is the type of decision that will have the unfortunate result of chilling a trend toward evolution use of safer methods of force in law enforcement. See Miller, 28 CREIGHTON L.

REV. at 735-37, n. 5; see also, Plakas, 19 F.3d at 1150 n.6 (noting that plaintiffs have argued in deadly force cases that the failure to use an alternative to deadly force, such as beanbag rounds, is itself a factor supporting the finding of excessive force).

In light of the foregoing analysis, Petitioners respectfully submit that Deputy Rutherford's use of the beanbag round as an alternative to deadly force was a reasonable use of force under the Graham standard. Deputy Rutherford was faced with an imminent attack from the raging Deorle who was holding a quart container of lighter fluid in his hand. Deputy Rutherford was not obliged to engage Deorle in hand-to-hand combat, nor did he have to retreat and allow Deorle to attack others in the nearby area. The use of the beanbag round is intended only to incapacitate an individual and allow for their arrest without inflicting serious injuries. Deputy Rutherford had been trained and used the device properly, aiming for Deorle's lower abdominal area from the proper distance. See Miller, *supra*, 28 CREIGHTON L. REV. at 768 (stating that less than lethal force is often appropriate to use against barricaded individuals armed with a weapon other than a firearm in order to prevent the need to use deadly force). If allowed to stand, the Court of Appeals' opinion will discourage the use of the beanbag rounds and other non lethal devices as alternatives to the use of deadly force through traditional guns and bullets.

In Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986), this Court announced that qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Moreover, an officer's use of force does not violate the Fourth Amendment when an "officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." Saucier v. Katz, supra, 121 S.Ct. At 2158. It cannot reasonably be disputed that Deputy Rutherford did not act plainly incompetent, nor did he knowingly violate the law in this case. Even assuming arguendo Deputy Rutherford mistakenly believed that Deorle was advancing toward him to cause him harm or that Deorle could use

the lighter fluid to cause him harm, those beliefs would be reasonable in light of all the information known to Deputy Rutherford concerning Deorle's conduct that day. Therefore, even if Deputy Rutherford reasonably., but mistakenly believed, that Deorle was advancing to cause him serious injury, Deputy Rutherford would have been justified in firing the beanbag round to knock Deorle down and temporarily incapacitate him, even if that was more force then needed. Thus, Petitioner respectfully submits that given Deputy Rutherford's reasonable beliefs of Deorle based on all of the information available to him, the use of the beanbag round was objectively reasonable and therefore Deputy Rutherford is entitled to qualified immunity.

The majority opinion of the Ninth Circuit is contrary to the legal standard enunciated by this Court in Graham and does not allow for the application of qualified immunity when the undisputed facts of the officer's conduct do not constitute a violation of the Fourth Amendment. Therefore, the majority opinion of the Ninth Circuit is in error and review is warranted in this case.

II.

Review Is Warranted Because The Opinion By The Ninth Circuit Conflicts With The Opinions Of This Court And Those Of Other Circuit Courts Of Appeal Concerning The Legal Standard For Determining Whether The Law Is Clearly Established For Purposes Of Qualified Immunity And It Is Of National Importance To Afford Qualified Immunity To Peace Officers When The Law Is Not Clearly Established Due To Conflicting Legal Standards, The Lack Of Any Factual Analogous Case Law And The Imposition Of New Standards

A. The Law Regarding The Firing Of A Beanbag Round Was Not Clrearly Established In September, 1996.

The District Court found that Deputy Rutherford was entitled to qualified immunity with respect to Deorle's claim for use of excessive force on the grounds that "a reasonable jury could not find that no reasonable officer would have made the same decision under the circumstances that confronted Deputy Rutherford." App. p. 74. In its decision rendered post Saucier v. Katz, the majority panel for the Ninth Circuit found that Deputy Rutherford was not entitled to qualified immunity, although there is no prior case law prohibiting the use of the beanbag round similar to the facts and circumstances in this case, because "no reasonable officer could have believed that Rutherford's action in shooting Deorle with the . . . beanbag round was appropriate or lawful." App. p. 19. At the time of the firing of the beanbag round in this case in September, 1996, however, there was no reported decision regarding the firing of a beanbag round and there was no factually analogous case law precedent. Moreover, despite denying qualified immunity, the Ninth Circuit imposed new standards governing the use of force upon which a peace officer's conduct may be adjudged objectively reasonable. Review by this Court is therefore necessary and appropriate to ensure the uniform application of qualified immunity in cases where the law is not clearly established in that the legal standard adoptee by the Ninth circuit conflicts with the law of this Court and other Courts of Appeal, the Ninth Circuit requires new standards and the law was not well settled regarding the use of a beanbag round.

This Court recently set forth the guidelines for the application of qualified immunity when excessive force is alleged. Saucier v. Katz, 533 U.S. 194; 121 S. Ct. 2151 (2001). Assuming an officer's conduct violated a constitutional right, then the next inquiry is whether that right was clearly established at the time of the incident. Id. at 281; 2156; Anderson v. Creighton, 483 U.S. 635, 639 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The test is whether a reasonable officer would have believed the shooting of the beanbag round to be lawful, in light of clearly established law and the information possessed by the officer. Hunter v. Bryant, supra, 503 U.S. at 227. The right alleged to have been violated must have been clearly established in a particularized, relevant sense. Saucier v. Katz, supra, 533 U.S. at 282, citing Anderson v. Creighton, supra, 483 U.S. at 640. For example, that level of specificity is achieved when "various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand . . ." Id. This Court further explained:

> an officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. at 284. In those circumstances, qualified immunity protects officers from the "hazy border between excessive and acceptable force." Id. at 284 citing Priester v. Riviera Beach, 208 F.3d 919, 926-927 (11th Cir. 2000).

Petitioners respectfully submit that "clearly established" means a clear bright line standard not compromised of generalities or possibilities. The bright line of clearly established law is "staked out by a process of inclusion and exclusion in individual concrete cases." Donovan v. City of Milwaukee, 17 F.3d 944, 953 (7th Cir. 1994). Moreover, "[i]f the law at the time is not clearly established, an officer could not reasonably be expected to anticipate subsequent legal developments nor could he or she fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow v. Fitzgerald, supra, 457 U.S. at 818. As Saucier reaffirms and the First Circuit Court of Appeals aptly pointed out, "the Supreme Court intends to surround the

police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases." Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994).

In determining whether the law was clearly established in this case, the majority panel of the Ninth Circuit relied upon Mendoza v. Block, 27 F.3d 1357, 1361 (9th Cir. 1994) which quoted Castell v. Pieschek, 3 F.3d 1050, 1053 (7th Cir. 1993). The Castell case stood for the proposition that a defendant's conduct could be so patently violative of a person's constitutional rights that guidance from the courts through closely analogous preexisting case law would not be required to show that the law is clearly established. The adoption of that legal standard in this case, however, is directly contrary to the legal standard adopted by this case in Saucier, which requires that various courts have found that certain conduct constitutes a constitutional violation under facts similar to the facts presented in this case. Moreover, under the circumstances of this case, the legal standard regarding whether the law is clearly established as adopted by the Ninth Circuit directly conflicts with the legal standard adopted in the Seventh and Eleventh Circuits. Compare Deorle App. pp. 19-20 (holding that although there is no prior case prohibiting the shooting of a beanbag round in precisely the circumstances involved and the absence of direct precedent, the law was clearly established) with Morrell v. Mock, 270 F.3d 1090, 1100-1101 (7th Cir. 2001) (requiring closely analogous case and rejecting potently obvious violation), Vaughn v. Cox, 264 F.3d 1027, 1036 (11th Cir. 2001) (holding that the preexisting case law must compel the conclusion that what the officer was in that case violates federal law) and Willingham v. Loughman, 261 F.3d 1178, 1188 (11th Cir. 2001) (requiring that there must be a materially similar case already decided that what the police officer was doing was unlawful in order for the law to be clearly established in the context of the Fourth Amendment). See also Branton v. The City of Dallas, 272 F.3d 730, 7440745 (5th Cir. 2001); Campbell v.

Peters, 256 F.3d 695, 700-701 (7th Cir. 2001). Thus, Petitioners respectfully submit that review is warranted by this Court to further clarify and define the legal standard regarding factually analogous case law under the second prong of the Saucier test.

In the case at bar, the majority panel in the Ninth Circuit has incorrectly attempted to expand the realm of a very narrow exception to the requirement that there be factually analogous case law to place an officer on notice that his conduct may violate a constitutional right. Generally, this narrow exception would only apply if an officer's conduct is obviously a violation of a constitutional right, and only then would guidance from the courts not be necessary to show that the law is clearly established. In those circumstances, a reasonable official would be presumed to know that the action was unconstitutional. In connection with this narrow exception, this Court has recognized "the easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." United States v. Lanier, 520 U.S. 259, 271; S. Ct. 1219, 1227-1228 (1997) (citation omitted). Indeed, even the Ninth Circuit has previously recognized this narrow exception. See Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) (particularized case law would not be necessary for a deputy to know that it would constitute excessive force to sic a canine on a handcuffed arrestee who has fully surrendered and is completely under control). See also Priester v. City of Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000) (applying exception to situation where police ordered dog to attack suspect who complied with officers, was on the ground and presented absolutely no threat). In Priester, the Eleventh Circuit correctly concluded that this exception should be reserved for only the most obvious cases, where a plaintiff can show that defendant's conduct was "so far beyond the hazy border between excessive and acceptable force that . . . every reasonable officer in their position would [inevitably] conclude the force was unlawful." Id.

If allowed to stand, this expanded exception as interpreted by the majority panel of the Ninth Circuit will in effect circumvent the test for whether the law is clearly established in Saucier. Under almost any given factual scenario, courts in the Ninth Circuit could easily conclude that it would have been obvious to that officer that his conduct violated a constitutional right. This is precisely the type of broad form general rule that the specific holding by this Court in Saucier was meant to prevent. This is similar to how the Ninth Circuit avoided the application of qualified immunity after the Graham decision by concluding that the law was then clearly established for all excessive force cases. Saucier, supra, 121 S. Ct. at 2155. Specifically, the Ninth Circuit will permit its broad interpretation of what was once thought of as a narrow exception to swallow the rule that the law be concrete and factually defined in order to be clearly established. In fact, the Ninth Circuit has already begun to use this narrow exception as a loop hole to escape the rule that the law be clearly established as set forth in Saucier. A recent case from the Ninth Circuit has now relied upon the majority opinion in this case for the proposition that the court need not find a factually analogous case in order to find that the law regarding excessive force was clearly established and deny qualified immunity. See Headwaters v. County of Humbolt, ("Headwaters II"), 2002 U.S. App. Lexis 455, *14, *on remanded from*, 122 S.Ct. 24 (2001), *amending and supplementing*, Headwaters v. County of Humboldt ("Headwaters I"), 240 F.3d 1185 (9th Cir. 2000). See also Vaughan v. Cox, supra, 264 F.3d at 1038-1039 (dissent by Judge Noonan sitting by designation from the Ninth circuit relying upon general rule rather than factually similar law).

Prior to this case, there is no reported decision holding that the deployment of beanbag rounds could constitute excessive force under any circumstances. Given the undisputed facts that Deputy Rutherford knew that Deorle had threatened officers with roofing hatchets, a cross-bow, a board with nails, was under the influence of alcohol and possibly controlled substances, had threatened to

kill officers or they should kill him, that he was out of control, that a neighbor was in the area and the perimeter was not secure and, following a brief exchange with Deorle at a distance of approximately forty feet, Deorle suddenly advanced toward Deputy Rutherford threatening to physically assault him while holding a quart container of lighter fluid. When Deorle reached a point of approximately thirty feet away from Deputy Rutherford, he fired a beanbag round at Deorle in order to knock him down and temporarily incapacitate him. Moreover, this is precisely the type of circumstances in which Deputy Rutherford was trained to utilize a beanbag round and based on that training, Deputy Rutherford would not be able to use a beanbag round if Deorle reached a distance of twenty feet away from him. Clearly, this is not an easy case where the conduct of the officer so obviously violates the constitutional rights of a suspect. Rather, this was a dynamic event which involved a subject who was intoxicated and out of control and given his prior threats and conduct was potentially capable of inflicting serious injury or death on the officer. For those reasons, Petitioners respectfully submit that the undisputed facts of this case should not be used to expand an otherwise narrow exception to the test for clearly established law set forth by this Court in Saucier.

In addition, the findings of the majority panel with respect to whether the conduct of Deputy Rutherford could constitute a violation of the Fourth Amendment is internally inconsistent with whether the law could be clearly established under the facts and circumstances of this case. In that regard the Ninth Circuit has added three new factors to be considered under the Graham analysis without reference to any legal precedent. First, the majority panel required Petitioner to make a showing of a strong governmental interest. App. p. 11. Second, the holding requires that Petitioner should have given a warning if feasible with the use of non-lethal force. App. p. 18. Third, the Court of Appeals holds that Petitioner should take into consideration the status of whether Deorle was mentally ill or unstable. App. p. 15. In spite of

requiring that Petitioner be governed by a heightened burden of governmental interest and new factors to access the reasonableness of his conduct for which there is no prior case law authority, the Court of Appeals concluded that the law was clearly established under the facts and circumstances of this case. Absent any authority for imposing those standards on Petitioner on or before September, 1996, it is inconceivable how the contours of the rights were sufficiently clear that a reasonable officer would understand that what he is doing violates that right. See Anderson v. Creighton, supra, 483 U.S. at 640.

Petitioner also respectfully submits that the law regarding the shooting of a beanbag round at a suspect was not clearly established at the time of this incident in September, 1996, because the legal standard as to whether this constituted deadly or non-deadly force was not settled. Not only was there no case law which defined the circumstances under which a beanbag round may be used to subdue a suspect, but the only published decision regarding the use of the beanbag round found that as of March, 1999, there was a factual dispute as to whether the use of the beanbag round constituted deadly or non-deadly force. See Omdahl v. Lindholm, 170 F.3d 730, 733-734 (7th Cir. 1999). Thus, a reasonable officer is the position of Deputy Rutherford could not have known that he violated a clearly established constitutional right of Deorle in that at least prior to this case, the law was not clearly established with respect to how this particular type of force would be characterized in terms of deadly or non-deadly force.

Based on the foregoing, Petitioner respectfully submits that review is warranted in this case to define what constitutes clearly established law in the context of when new and different requirements are adopted by the Courts of Appeal and to reconcile the requirement of factual analogous case law to provide for national uniformity of that standard. Petitioner respectfully requests that this Court grant this Writ of Certiorari in order to review the Ninth Circuit's opinion to clarify when the law is clearly

established in relation to the policy favoring qualified immunity or public officials.

B. A Reasonable Officer Firing A Beanbag Round At An Advancing Threatening Intoxicated Suspect Would Not Have Known That He Was Violating Clearly Established Law.

Contrary to this Court's guiding principles in Saucier, the majority opinion of the Ninth Circuit fails to adhere to the rules established for the second prong of the qualified immunity analysis. The teachings of this Court requiring factual specificity in the context of whether the law is clearly established flow from a long line of cases from Anderson, Hunter, Lanier, Wilson to Saucier. That requirement has theoretically been clear and unambiguous. See Vaughn v. Cox, supra, 264 F.3d at 1036 (post Saucier case) and Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1149-50 (11th Cir. 1994). This case, however, once again gives rise to the need for this Court to establish a uniform application of the legal standard to be applied with respect to whether the law is clearly established in the application of qualified immunity.

The majority opinion expressly concedes that "there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved. . . ." App. p. 19. As the Eleventh Circuit correctly noted, the most common error involving whether the law was clearly established under the circumstances confronting the defendant is to rely upon general rules and abstract rights. Lassiter, supra, 28 F.3d at 1150. In this case, the majority panel has taken its position to the extreme. To conclude that a constitutional violation is obvious in this case is the penultimate of abstract generality. The undisputed facts in this case call into play the need for practical application to real life situations involving concrete circumstances. However, here as in Saucier, "neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did." Saucier v. Katz,

supra, 121 S.Ct. At 2160. Absent any cases in which "various courts have agreed" that the conduct of firing a beanbag round in circumstances similar to this case is a constitutional violation, a reasonable officer in the position of Deputy Rutherford in September, 1996, could not have known that he was violating a clearly established right.

Prior to September, 1996, there were only two reported decisions which may even potentially involve factually analogous cases. Both of those cases, however, would support the application of qualified immunity in favor of Deputy Rutherford. In Russo v. City of Cincinnati, 953 F.3d 1036, 1044-45 (6th Cir. 1992), the Sixth Circuit found that there was no excessive force by a police officer who used a taser stun gun against an advancing, emotionally unstable, suicidal threatening individual armed with knives. In Hinton v. City of Elwood, 997 F.2d 774, 781-82 (10th Cir. 1993), the Tenth Circuit found that a peace officer's use of a stun gun was reasonable in light of the plaintiff actively resisting the attempts to handcuff him. Thus, the guidance, if any, which Deputy Rutherford or other reasonable officers would have obtained from those cases would be that the use of stun guns and tasers to temporarily incapacitate a suspect would be appropriate when the suspect is advancing toward the officer while armed with a knife threatening an assault or when actively resisting arrest. Thus, in light of that preexisting case law, a reasonable officer in the position of Deputy Rutherford would have believed that his conduct in shooting the beanbag round to temporarily incapacitate the advancing, out of control Deorle who was threatening to physically assault the officer while armed with a container of lighter fluid was be lawful under the circumstances.

The direct conflict between the Ninth Circuit and the Seventh and Eleventh Circuits with respect to the second prong of the qualified immunity test set forth in Saucier, as well as the lack of clearly defined factual scenarios in the use of non-lethal force such as the beanbag rounds, should be reconciled so that there is uniform application of an appropriate legal standard to afford

qualified immunity to peace officers who are alleged to have used excessive force. It is of extreme national importance that the legal standard be known and fully understood by peace officers and law enforcement agencies throughout the country so that peace officers that are constantly confronted with rapidly evolving circumstances will have a better understanding of the constitutional perimeters of their use of less than lethal force. Peace officers already face arguments that in circumstances involving deadly force, they should have been equipped to use other non-deadly force equipment such as beanbag rounds. Yet in this case, when properly trained in the use of beanbag rounds to temporarily incapacitate a suspect or person who needs to be taken into custody so as to cause the least amount of harm to the individual and the officers, the majority panel has denied the application of qualified immunity notwithstanding that the legal standard is not well settled. Peace officers in these situations can only speculate as to whether their conduct is within constitutional boundaries. Petitioner respectfully submits that the law is not clearly established, nor was it in September, 1996, such that Deputy Rutherford could have known that his conduct was unlawful. Therefore, Petitioner respectfully requests that this Court grant this Writ of Certiorari in order to review the Ninth Circuit's opinion and clarify the law governing qualified immunity.

III.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Dated: February 15, 2002

Respectfully submitted,

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